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PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of

Bruce E. Kramer et al.

U.S. Application No.: 10/033,775

Confirmation No.: 8566

Group Art Unit: 3764

Filed: January 3, 2002

Examiner: Stephen R. Crow

For: Treadmill

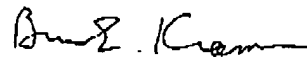
RESPONSE TO NOTIFICATION OF NON-COMPLIANT APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

In response to the Notification of Non-Compliant Appeal Brief dated March 13, 2009, Appellants submit herewith their amended argument section matching the grounds section inasmuch as each grounds corresponds to a heading within the argument section.

Respectfully submitted,



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Date: April 13, 2009

**RESPONSE TO NOTIFICATION OF NON-COMPLIANT APPEAL BRIEF
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Name of person signing this certificate: Bruce E. Kramer

Signature: Bruce E. Kramer

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ARGUMENT

Rejection of Claims 6-7, 10-12, 18-19, and 22-26 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement

On page 3 of the Office Action of August 15, 2008, claims 6-7, 10-12, 18-19, and 22-26 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

The Examiner's Position

The Examiner's position is that the pair of endless belts and other structure claimed in claims 6-7, 10-12, 18-19 and 22-26 are not described and shown by the disclosure.

Further, on page 6 of the Office Action, the Examiner indicates that the original specification does not support an element 54 which is linear and which extends orthogonally away from a middle portion of the handlebar 46. The Examiner indicates that handle 54 is not integral with the handlebar 46 and handle 54 is not in the "middle portion"; rather, handle 46 possesses a middle portion which cannot be seen due to the display. The Examiner indicates that handle 54 is a separate handlebar.

In addition, the Examiner indicates that Fig. 2 is defective because it fails to teach main things, namely, whether the belts are equal sized and how the extra pair of rollers is supported on the frame. The Examiner indicates that Appellant has introduced a central support between the pair of treadmills for supporting the rollers, and that this structure lacks support in the specification.

The Examiner indicates that the adage "a picture is worth a thousand words" is applicable here, and in most cases, a drawing is more detailed than the written disclosure.

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Further, in his supplemental remarks, the Examiner indicates on page 7 of the Office Action that there are several elements shown in Fig. 2 which do not necessarily follow from the specification as originally filed and thus are considered new matter, including with respect to handlebar element 54. In this regard, the Examiner indicates that it isn't a case of whether one would understand that the handlebar would extend perpendicularly and linearly from the middle of the main handle, nor that the extra pair of rollers can be supported on the frame in the manner shown in Fig. 2 but not Fig. 1. The Examiner further indicates that this structural arrangement isn't "readily envisioned by one skilled in the art", contrary to Appellants' assertion.

Appellants' Response

In response, Appellants submit that the present claims satisfy the requirements of 35 U.S.C. 112, first paragraph, and request that the Examiner reconsider and withdraw this rejection in view of the following remarks.

Claims 7, 10-12, 18-19 and 22-26

In response, Appellants submit initially that contrary to the Examiner's position, the pair of endless belts and other structure recited in the claims are described and shown in the specification at, e.g., in the description from page 5, line 13 to page 6, line 16 and in the description in the last paragraph on page 7 in the application. Further, Appellants submit that this disclosure is sufficient, particularly when the knowledge in the art is considered, even without considering the drawings in the present case.

In this regard, with respect to the knowledge in the art as to how the extra pair of rollers is supported on the frame, Appellants note that in the Office Action of January 10, 2006, the Examiner himself cited references which teach dual-type treadmills (see

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paragraph 3 on page 5 of the January 10, 2006 Office Action, as well as the references listed on the PTO-892 form attached to that Office Action). For instance, Fig. 2 in U.S. Patent 5,607,376 and Fig. 1 in U.S. Patent 4,204,673 together with the associated disclosure in each of those patents is evidence of the knowledge in the art as to how an extra pair of rollers is supported on a frame (see the attached copies of U.S. Patents 5,607,376 and 4,204,673). As set forth in MPEP 2164.05, an Appellant may cite references to show what one skilled in the art knew at the time of filing the application. Further, as set forth in MPEP 2164.05(a), the specification need not disclose what is well-known to those skilled in the art and preferably omits that which is well-known to those skilled and already available to the public. *In re Buchner*, 929 F.2d 660, 661 18 USPQ2d 1331, 1332 (Fed. Cir. 1991), *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1384, 231 USPQ 81, 94 (Fed. Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); and *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1463, 221 USPQ 481, 489 (Fed. Cir. 1984).

Appellants submit that element 54 (relevant to claims 12 and 24, which are supported by the disclosure at page 7, lines 4-17) is supported by, e.g., the disclosure at page 7, lines 13-17 in the original specification. From this description, Appellants submit that one skilled in the art would readily envision an element 54 that is linear and extends orthogonally away from a middle portion of the handlebar 46. While the Examiner indicates that handle 54 is not integral with the handlebar 46 and that handle 54 is not the "middle portion" but rather handle 46 possesses a middle portion which cannot be seen due to the display and handle 54 is a separate handlebar. Appellants submit that one skilled in the art would readily envision middle portion 54 based on the description in the

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last paragraph on page 7 in the application and would understand that middle portion 54 is connected to the middle part of handle bar 46, as discussed at page 7, lines 13-14. In this regard, Appellants submit that the Examiner is confusing "middle portion" with "middle part" as those terms are used in the specification, e.g., in the last paragraph on page 7.

In regard to Fig. 2, Appellants submit that the answers to the issues raised by the Examiner, namely, whether the belts are equal sized and how the extra pair of rollers is supported on the frame, would be readily understood by one skilled in the art in view of the aforementioned disclosure at page 5, line 13 to page 6, line 16, and the knowledge in the art (e.g., Fig. 2 in U.S. Patent 5,607,376 and Fig. 1 in U.S. Patent 4,204,673 together with the associated disclosure in each of those patents), as discussed above.

With respect to the Examiner's indication that the adage "a picture is worth a thousand words" is applicable here and that in most cases a drawing is more detailed than the written disclosure, Appellants again submit that the figures in the present application are supported by, e.g., the written disclosure on pages 5-7 as discussed above, particularly when that disclosure is considered in view of the skill in the art, as discussed above.

As to the Examiner's indication that the drawing changes added new matter, Appellants respectfully disagree and submit that the drawing changes are supported by the specification as originally filed, including the disclosure at page 5, line 13 to page 6, line 16 and in the description in the last paragraph on page 7 as discussed above. With respect to the Examiner's indication that the "readily envisioned by one skilled in the art" argument is subjective, Appellants disagree and submit that one skilled in the art considering the disclosure in the present specification together with the knowledge in the

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art (such as U.S. Patents 5,607,376 and 4,204,673 discussed above) would be able to readily envision the claimed invention. Regarding the Examiner's question as to how the new subject matter is readily envisioned by the prior art if the prior art doesn't teach the claimed invention, Appellants submit that the subject matter at issue is readily envisioned by the disclosure in the present specification taken together with the knowledge in the art. As to the Examiner's indication that it still remains unclear how one would realize the linear, horizontal element of the proposed drawing in addition to how it would be attached to the handle bar 46 from a reading of the specification, Appellants submit that the description in the last paragraph on page 7 in the specification (including the disclosure that the middle portion can extend back from a middle part of the front portion and that, when not desired, the middle portion either can be pivoted so that it hangs down from the front portion or can be removed) is sufficient to describe the linear, horizontal element of the proposed drawing in addition to how it would be attached to the handle bar 46.

Claims 6 and 18

Appellants submit that claims 6 and 18 are adequately described in a manner similar to that discussed above with respect to claims 12 and 24, except that the issue of the pair of belts and other structure recited in independent claims 7 and 19 does not arise since claims 6 and 18 depend from claims 1 and 13, respectively (in contrast to claims 12 and 24, which depend from claims 7 and 19, respectively). See, e.g., page 7, lines 4-17 for disclosure supporting claims 6 and 18.

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In addition, Appellants submit that element 54 in Fig. 1 is supported by, e.g., the disclosure at page 7, lines 13-17 in the original specification. From this description, Appellants submit that one skilled in the art would readily envision an element 54 that is linear and extends orthogonally away from a middle portion of the handlebar 46. While the Examiner indicates that handle 54 is not integral with the handlebar 46 and that handle 54 is not the "middle portion" but rather handle 46 possesses a middle portion which cannot be seen due to the display and handle 54 is a separate handlebar, Appellants submit that one skilled in the art would readily envision middle portion 54 based on the description in the last paragraph on page 7 in the application and would understand that middle portion 54 is connected to the middle part of handle bar 46, as discussed at page 7, lines 13-14. In this regard, Appellants submit that the Examiner is confusing "middle portion" with "middle part" as those terms are used in the specification, e.g., in the last paragraph on page 7.

Further, Appellants submit that the description in the last paragraph on page 7 in the specification (including the disclosure that the middle portion can extend back from a middle part of the front portion and that, when not desired, the middle portion either can be pivoted so that it hangs down from the front portion or can be removed) is sufficient to describe the linear, horizontal element of the proposed drawing in addition to how it would be attached to the handle bar 46.

Thus, Appellants submit that claims 6-7, 10-12, 18-19, and 22-26 satisfy the requirements of 35 U.S.C. 112, first paragraph, and reversal of this rejection is respectfully requested.

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Rejection of Claim 1 under 35 U.S.C. 102(b) as being clearly anticipated by Moon et al

On page 4 of the Office Action of August 15, 2008, Claim 1 is rejected under 35 U.S.C. 102(b) as being clearly anticipated by Moon et al.

In response, Appellants note initially that claim 1 recites a treadmill having an endless belt which is wide enough to accommodate two treadmill users side-by-side, wherein the two treadmill users are two adult people.

Appellants submit that Moon does not teach or suggest such a wide belt, and Appellants note that the Examiner has still not identified the specific disclosure in Moon which he considers anticipatory, despite the specific request made page 12 in the Amendment filed February 6, 2008.

In this regard, Appellants note that MPEP 2125 states that when a reference does not disclose that the drawings are to scale and is silent as to dimensions, arguments based on measurement of the drawing features are of little value. See *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000) (The disclosure gave no indication that the drawings were drawn to scale. "[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.").

With respect to the Examiner's indication on page 6 of the Office Action that the language "adult people" doesn't recite specific dimensions and that adult humans come in various sizes, such as dwarfs who are abnormally small, Appellants submit that such an interpretation is unreasonable and is not the interpretation that one skilled in the art would

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give to the terminology at issue. In this regard, Appellants note that the recitation of two adult people was originally recited in claim 2, which depended on claim 1 and recited that the belt has a width which is large enough to accommodate two adult people side-by-side. Claim 1 recited that the belt has a width which is large enough to accommodate two treadmill users side-by-side. For claim 2 to be a proper dependent claim and further limit claim 1, the recitation in claim 2 of two adult people side-by-side would need to result in a belt which is wider than the minimum width belt which could accommodate two treadmill users side-by-side. Thus, Appellants submit that the Examiner has not fairly interpreted the recitation of adult people in claim 1.

In view of the above, Appellants submit that the present invention is not anticipated by (or obvious over) either Moon. Accordingly, reversal of this rejection is respectfully requested.

Rejection of Claim 1 under 35 U.S.C. 102(b) as being clearly anticipated by Kelsey et al

On page 4 of the Office Action of August 15, 2008, Claim 1 is rejected under 35 U.S.C. 102(b) as being clearly anticipated by Kelsey et al.

In response, Appellants again note that claim 1 recites a treadmill having an endless belt which is wide enough to accommodate two treadmill users side-by-side, wherein the two treadmill users are two adult people.

Appellants submit that Kelsey et al does not teach or suggest such a wide belt, and Appellants note that the Examiner has still not identified the specific disclosure in Kelsey

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et al which he considers anticipatory, despite the specific request made page 12 in the Amendment filed February 6, 2008.

In this regard, Appellants note that MPEP 2125 states that when a reference does not disclose that the drawings are to scale and is silent as to dimensions, arguments based on measurement of the drawing features are of little value. See *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000) (The disclosure gave no indication that the drawings were drawn to scale. "[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.").

With respect to the Examiner's indication on page 6 of the Office Action that the language "adult people" doesn't recite specific dimensions and that adult humans come in various sizes, such as dwarfs who are abnormally small, Appellants submit that such an interpretation is unreasonable and is not the interpretation that one skilled in the art would give to the terminology at issue. In this regard, Appellants note that the recitation of two adult people was originally recited in claim 2, which depended on claim 1 and recited that the belt has a width which is large enough to accommodate two adult people side-by-side. Claim 1 recited that the belt has a width which is large enough to accommodate two treadmill users side-by-side. For claim 2 to be a proper dependent claim and further limit claim 1, the recitation in claim 2 of two adult people side-by-side would need to result in a belt which is wider than the minimum width belt which could accommodate two treadmill users side-by-side. Thus, Appellants submit that the Examiner has not fairly interpreted the recitation of adult people in claim 1.

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In view of the above, Appellants submit that the present invention is not anticipated by (or obvious over) either Kelsey et al. Accordingly, reversal of this rejection is respectfully requested.

Rejection of Claims 1, 5, 13, 17, 18, and 22-26 under 35 U.S.C. 103(a) as being unpatentable over Moon et al in view of Derksen

On page 4 of the Office Action of August 15, 2008, claims 1, 5, 13, 17, 18 and 22-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moon et al in view of Derksen.

The Examiner's Position

The Examiner indicates that Moon et al teaches all of Appellants' claimed invention except for the specific widths claimed. The Examiner's position is basically that in view of the well recognized use of treadmills for training horses as shown in Derksen, it would have been obvious to enlarge the Moon et al treadmill to any desirable width for accommodating any desired animal for exercise purposes. The Examiner indicates that Derksen is considered to be from an analogous art as Moon, since both include rollers and belts and therefore inherently have belt widths, and both are used to exercise mammals for a gaiting type exercise. The Examiner indicates that an enlarged treadmill width would be desired to accommodate extremely large persons or animals and is considered a design choice that carries no patentable weight. As to the method claims, the Examiner indicates that such a sized treadmill could be used for any desired function, such as accommodating plural animals. The Examiner indicates that Appellants have

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merely taken Moon's Figure 1 treadmill and made it wider, and the Examiner asserts that where a change in size of a prior art reference merely represents a change in degree, and not a change in kind, such a change is a design consideration within the skill of the art.

Appellants' Response

Appellants respectfully submit that the present invention is not obvious over Moon et al in view of Derksen, and request that the Board reverse this rejection in view of the following remarks.

Claims 1, 5, 13, 17, 18, and 22-26 Overall

(1) Appellants submit that one of ordinary skill in the art would not have combined Moon et al and Derksen.

Specifically, Moon et al is directed to a treadmill having a control panel positioned in such a manner as to minimize the likelihood of a user's foot striking a forward part of the treadmill's stationary base when the user is accessing the control panel (see, e.g., col. 1, lines 20-35). Thus, the Moon et al treadmill is directed to a user who would be on the treadmill and accessing the control panel.

In contrast, Derksen is discloses a treadmill used by a horse.

Since a horse is not a treadmill user that would be accessing a control panel, one of ordinary skill in the art would not have applied the teachings of Derksen to Moon et al.

That is, one of ordinary skill in the art would not have made the belt of the Moon et al treadmill wide enough to accommodate a horse, because the Moon et al treadmill, with its specifically positioned control panel, is not intended to be used by a horse.

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Rather, the Moon et al treadmill is intended to be used by a person, since a person is a user who would access a control panel. That is, the desired animal using Moon for exercise purposes is a person, and thus one would not modify Moon to suit a horse.

In this regard, as can be seen from the use of treadmills with standard sized belts by extremely large people in fitness clubs, an extremely large person can use a treadmill with a standard sized belt. Since an extremely large person can use a treadmill with a standard sized belt in a fitness club, one of ordinary skill in the art would not have been motivated to enlarge the belt in Moon et al, particularly since such would have added to the cost of the Moon et al treadmill.

Thus, one of ordinary skill in the art would not have modified Moon in view of Derksen, and that claims 1 and 13 and the claims dependent thereon are not obvious over Moon et al in view of Derksen accordingly.

(2) With respect to the Examiner's indication that the size change is a matter of degree, not kind, and that it does not produce a new form of exercise equipment but rather the size change merely enlarges the size of the treadmill, Appellants submit that their wider treadmill is not merely a change in degree, but rather is a change in kind and produces a new form of exercise equipment. In this regard, Appellants submit that their wider treadmill enables a completely new form of treadmill exercising, namely, exercising by two adult treadmill users side-by-side on the same treadmill, which is neither taught nor suggested by either Moon or Derksen. Since the present invention provides a completely new form of exercising, Appellants submit that it is a change in kind. Indeed, Appellants submit a treadmill which results in a completely new form of

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treadmill exercising represents a new form of exercise equipment and thus is a change in kind for this additional reason.

The invention product permits two adult treadmill users to exercise side-by-side while holding hands, which has not been possible previously, either in Moon or elsewhere. Thus, the invention is directed to an entirely different market than that targeted by Moon, namely, companion exercisers rather than a solo exerciser. This is a change in kind, not a change in degree.

Additional Reasoning for Patentability of Method Claims 13, 17, 18, and 26

In regard to method claims 13, 17, 18, and 26 Appellants submit that these claims are also not obvious because the cited references neither teach nor suggest that more than one user can be using the treadmill at one time, and thus neither teach nor suggest the claimed method for exercising two adult treadmill users positioned side-by-side on the belt of a treadmill. Accordingly, even if the belt in Moon et al were wide enough to accommodate plural animals (which Appellants submit would not have been the case, as discussed above), there is still no teaching or suggestion in the cited art which would lead one to have actually exercised plural animals on such a belt.

That is, with respect to the Examiner's assertion that a modified version of Moon could be used for any desired function, such as accommodating plural animals, Appellants submit that the function of accommodating plural animals was not recognized at all in either Moon or Derksen (the Moon treadmill is intended to be used by one person at a time, and the Derksen treadmill is intended to be used by one horse at a time), let alone be recognized as a desired function, so one would not have been led to the presently claimed method from Moon in view of Derksen.

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With respect to Moon in particular, Appellants submit that Moon does not contemplate accommodating plural animals, and there is no reason why one of ordinary skill in the art would look to Moon to accommodate plural animals. Moon simply represents a standard sized treadmill, which one of ordinary skill in the art would consider suitable for use by a single user. Two small adults would not use the Moon treadmill side-by-side because there is no teaching or suggestion to do such, and further that treadmill is too narrow and thus there would be a danger of falling and suffering injury.

Thus, Appellants submit that claim 13 and the claims dependent thereon are not obvious over Moon et al in view of Derksen for the above additional reasoning.

Further Reasoning for Patentability of Claims 18, 25 and 26 in Particular

As to claims 18, 25 and 26 in particular, Appellants submit that these claims are further patentable because the cited art combination neither teaches nor suggests an embodiment which includes a handle bar having a middle portion that can extend back from a middle part of the front portion of the handle bar. The middle portion can be grasped by the right hand of the left user and/or by the left hand of the right user of the claimed treadmill, and such is simply not contemplated by Moon et al and Derksen.

Further Reasoning for Patentability of Claims 22-24

Appellants note that claims 22-24 depend directly or indirectly on independent claim 19, which is not even included in this rejection. By virtue of their dependence on claim 19, claims 22-24 require two belts, which are neither taught nor suggested by Moon and Derksen. Thus, Appellants submit that claims 22-24 are patentable for this additional reason.

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Therefore, Appellants submit that the present invention is not obvious over Moon and Derksen, and reversal of this rejection is respectfully requested.

Rejection of Claims 1, 5, 13, 17, 18, and 22-26 under 35 U.S.C. 103(a) as being unpatentable over Kelsey et al

On page 5 of the Office Action, claims 1, 5, 13, 17, 18, and 22-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelsey et al.

The Examiner's Position

The Examiner's position is that Kelsey discloses a treadmill as depicted in Figure 2 having an adult male supported thereon, and the Examiner indicates that the Kelsey treadmill width in Figure 2 appears to be approximately 40-45 inches, based on the relative dimensions of the user and the treadmill. In this regard, the Examiner considers Figure 2 to be an accurate representation of the proportionality of the treadmill with respect to the user, and that it is proper to approximate the width of the treadmill given the proportional dimensions provided in Figure 2.

Appellants' Response

In response, Appellants note that as set forth above, MPEP 2125 states that when a reference does not disclose that the drawings are to scale and is silent as to dimensions, arguments based on measurement of the drawing features are of little value. See *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000) (The disclosure gave no indication that the drawings were drawn to scale. "[I]t is well established that patent drawings do not define the precise proportions

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of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.").

Appellants submit that Kelsey does not disclose that the drawings are to scale and is silent as to dimensions. Thus, Appellants submit that the Examiner's arguments based on measurement of the drawing features are of little value.

Appellants note that Kelsey is directed to a single person using a treadmill, and there is no reason why one would make the belt wide enough to be used by two treadmill users as in the present invention.

Additional Reasoning for Patentability of Method Claims 13, 17, 18, and 26

As to method claims 13, 17, 18, and 26 in particular, since Kelsey is directed to a single person using a treadmill Appellants submit that there is simply no teaching or suggestion in Kelsey of exercising two treadmill users side-by-side on a single treadmill, and thus the method claims are not obvious over the cited art for this additional reason.

Further Reasoning for Patentability of Claims 18, 25 and 26 in Particular

As to claims 18, 25 and 26 in particular, Appellants submit that these claims are further patentable because Kelsey neither teaches nor suggests an embodiment which includes a handle bar having a middle portion that can extend back from a middle part of the front portion of the handle bar. The middle portion can be grasped by the right hand of the left user and/or by the left hand of the right user of the claimed treadmill, and such is simply not contemplated by Kelsey.

Further Reasoning for Patentability of Claims 22-24

Appellants note that claims 22-24 depend directly or indirectly on independent claim 19, which is not even included in this rejection. By virtue of their dependence on

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claim 19, claims 22-24 require two belts, which are neither taught nor suggested by Kelsey. Thus, Appellants submit that claims 22-24 are patentable for this additional reason.

Therefore, Appellants submit that the present invention is not obvious over Kelsey, and reversal of this rejection is respectfully requested.

Conclusion

In view of the above remarks, Appellants submit that the present invention is patentable, and reversal of the rejections is respectfully requested.

Respectfully submitted,

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Date: February 17, 2009